Supreme Court, U.S.
FILED
AUG 16 1996
CLERK

(8)

Nos. 95-1649, 95-9075

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF KANSAS,
Petitioner,
v.
LEROY HENDRICKS,
Respondent.

LEROY HENDRICKS,
Cross-Petitioner,
v.
STATE OF KANSAS,
Cross-Respondent.

On Writs of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF LEROY HENDRICKS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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36 pp

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INTEREST OF *AMICUS CURIAE*

The American Psychiatric Association (APA), with approximately 42,000 members, is the Nation's leading organization of physicians specializing in psychiatry. The APA has participated as *amicus curiae* in numerous cases involving mental-health issues in this Court, including *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), *Riggins v. Nevada*, 504 U.S. 127 (1992), *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Washington v. Harper*, 494 U.S. 210 (1990), *Allen v. Illinois*, 478 U.S. 364 (1986), and *Addington v. Texas*, 441 U.S. 418 (1979). The APA and its members have a strong interest in ensuring that medical diagnoses not be improperly invoked to support involuntary confinement and that psychiatric hospitalization be reserved for proper care and treatment of patients. The APA accordingly has a strong interest in this case.[1]

STATEMENT

The Kansas Sexually Violent Predator Act provides for the confinement of "sexually violent predators" who are not mentally ill under the normal standards justifying civil commitment. The Kansas Supreme Court, relying on *Foucha v. Louisiana*, 504 U.S. 71 (1992), struck down the statute as a form of preventive detention that impermissibly sidesteps the limits on criminal punishment of convicted offenders. Kansas challenges that holding, relying critically on its asserted interest in treatment. Leroy Hendricks defends the Kansas Supreme Court's holding both under *Foucha* and on the closely related ground that the statute is essentially criminal and so, as applied to him, imposes a second punishment in violation of the *ex post facto* and double jeopardy clauses.

A. The Kansas Act begins by acknowledging that it is designed to reach individuals who do *not* come within the standards governing normal civil commitment: "a small but extremely dangerous group of sexually vio-

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[1] A joint letter from the parties consenting to the filing of this brief has been lodged with the Clerk of this Court. *Amicus* has no parent or subsidiary companies.

lent predators exist who do not have a mental disease or defect that renders them appropriate for [civil commitment]."[2] Unlike "persons appropriate for civil commitment," the Act continues, "sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities." As a result of the high likelihood of "repeat acts of predatory sexual violence," the statute declares, commitment procedures are "inadequate," "the prognosis for rehabilitating sexually violent predators in a prison setting is poor," "the treatment needs of this population are very long term," and appropriate "treatment modalities" are "very different" from those appropriate in regular civil commitment. Kan. Stat. Ann. § 59-29a01.

The Act defines "sexually violent predator" to mean "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence [if unconfined]." Kan. Stat. Ann. § 59-29a02.[3] The qualifying "sexually violent offense[s]" include rape and various sex offenses involving children. "[P]ersonality disorder" is not defined; "mental abnormality" is defined to mean "a congenital or acquired [*i.e.*, any] condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in

[2] The general Kansas civil commitment statute requires that the individual not only have "a severe mental disorder to the extent that such person is in need of treatment" and be "likely to cause harm to self or others," but also that the individual "lack[] capacity to make an informed decision concerning treatment." Pet. App. 19a. ("Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 95-1649.)

[3] In referring to persons who are charged with but not convicted of a criminal offense, the statute later makes clear that it means persons who have been found incompetent to stand trial on the criminal charges or not guilty by reason of insanity. Kan. Stat. Ann. § 59-29a03. This case does not involve such a situation—which raises distinct issues (*see* note 8, *infra*) and is not further discussed here.

a degree constituting such person a menace [to others]." The Act thus requires [1] a sex offense plus [2] a mental condition that makes the person "likely" to commit further sexual offenses. *Id.*

The Act provides for initiation of confinement proceedings only for convicted criminals nearing release. Kan. Stat. Ann. § 59-29a03; *see* note 3, *supra*. The state officials with custody, if they think that the person might meet the "sexually violent predator" standard, are required to notify the Attorney General, whose "prosecutor's review committee" is then responsible for determining whether the standard is met (based in part on an assessment from a "multidisciplinary team"). *Id.* § 59-29a03. The Attorney General (or local district attorney) may then file a petition in court alleging that the person is a sexually violent predator. *Id.* § 59-29a04.

If the court finds probable cause, the respondent/defendant is confined in a secure facility (which may be a county jail) for evaluation by a qualified professional. *Id.* § 59-29a05. A trial is then held (before a jury if called for by the defendant, prosecutor, or judge) in which the prosecutor must prove beyond a reasonable doubt that the defendant is a sexually violent predator. *Id.* §§ 59-29a06, 59-29a07. If the finder of fact finds the standard met, the defendant is committed to "the custody of the secretary of social and rehabilitation services [SRS] for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." *Id.* § 59-29a07. The SRS secretary must keep such persons segregated from other civil committees (since June 1995, in a separate facility); the SRS secretary may, however, arrange for confinement by the prison authorities, who must "house[]" and "manage[]" such persons separately from other offenders. *Id.*

Once committed, the "predator" must be given "care and treatment" that "conform to constitutional requirements." *Id.* § 59-29a09. He must also be furnished an

examination of his mental condition, and a court review of his status, once every year. *Id.* § 59-29a08. If he seeks release at this annual review, and the court finds probable cause to think that the "mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged," he is entitled to a new hearing on continued predator status. *Id.* § 59-29a08.

The Act also authorizes petitions for release outside the annual-review process. If the SRS secretary believes that the "predator" qualifies for release, he must be authorized to file a petition, and a full hearing follows. *Id.* § 59-29a10. A confined "predator" may file for release on his own, without SRS authorization; but while the statute directs that a second such petition should be dismissed without a hearing if there is no evidence of a *changed* condition, it sets no standard for reviewing a first solo petition. *Id.* § 59-29a11. According to the Kansas Supreme Court, release through this last mechanism is "improbable." Pet. App. 8a.

B. 1. Leroy Hendricks, who is 60 years old, has a long history of taking "indecent liberties" with children. In 1984, he pled guilty to two counts of that offense and was sentenced to 5-20 years; the State dropped a third count and did not seek longer imprisonment under the state recidivism statute. In 1994, when Hendricks was about to be released (under parole-like terms), the State petitioned a court to continue Hendricks's confinement under the new Act. Pet. App. 1a-2a; J.A. 5. After evaluations of Hendricks, a trial was held. J.A. 125-361.

As summarized by the Kansas Supreme Court, Hendricks testified

> that his history of sexual involvement with children began with his exposing himself to two girls in 1955, and that he had spent approximately half the time since then in prison or in psychiatric institutions. He explained that when he gets "stressed out," he is unable to control the urge to engage in sexual activity with a child. Hendricks agreed that he is a pedophile and that he is not cured of the condition.

Pet. App. 3a; *see* J.A. 125-91. (Although Kansas intimates otherwise, Hendricks did not testify that he would reoffend if released.) The State's chief psychologist, who examined Hendricks, testified that Hendricks was not mentally ill (J.A. 256) but was a pedophile (J.A. 247); that pedophilia is a "mental abnormality" under the "circular" definition meaning a person having a condition predisposing him to sexually violent offenses (*see* J.A. 263-64); and that Hendricks was "likely" to repeat his sexual activity with children if free (J.A. 248). *See* Pet. App. 3a-4a, 18a-19a.[4] The Kansas Supreme Court later stated that "the State's own evidence is that Henricks was being committed even though he does not suffer from mental illness." Pet. App. 20a. A psychiatrist called by Hendricks testified that the research literature showed only a small drop in reoffense rates from treatment of sexual offenders and that psychiatrists and psychologists cannot predict whether an individual is more likely than not to engage in an act of sexual predation. Pet. App. 4a.

Hendricks was found to be a sexually violent predator and committed to the custody of SRS, which sent him to the Larned State Hospital. As of October 1994, the State had not hired "professionals specifically dedicated to a treatment program for sexually violent predators." Pet. App. 4a. *Cf.* J.A. 389-455 (habeas proceeding, in August 1995, on the treatment then available).

2. On appeal, the Kansas Supreme Court held that the Act violates the substantive due process command of the federal Constitution, relying on this Court's 1992 decision in *Foucha*. In its "majority opinion" (Pet. App. 21a), the Kansas court concluded that the Act's purportedly

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[4] The State's psychologist agreed that—just as an alcoholic, though not "cured," cannot be predicted to reoffend (because control is possible)—"simply by giving a diagnosis of pedophilia, you aren't saying that a person would re-offend in the future." J.A. 272.

civil confinement must rest on "clear and convincing proof of mental illness *and* dangerousness": it is not enough to have " 'committed a criminal act' " and have " 'an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment.' " Pet. App. 12*a* (quoting *Foucha*, 504 U.S. at 82). The Kansas statute does not require (and Hendricks concededly does not have) a "mental illness." Pet. App. 19a-20a. The court therefore held the Act invalid.[5]

In reaching that conclusion, the Kansas court construed the Kansas legislature's purposes as follows:

> It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent.

Pet. App. 15a. In light of the Act's declaration that the designated "predators" are not amenable to the treatments provided through normal civil commitment, the court said, "the provisions of the Act for treatment appear somewhat disingenuous." *Id.* at 15a. The court added: "It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment." *Id.* at 16a. The court also noted "that the legislature has provided the State with other options" to confine a person like Hendricks—*e.g.*, maximum sentences; consecutive (as opposed to concurrent) sentences; or tripling of sentences under the recidivism statute. *Id.* at 16a.

SUMMARY OF ARGUMENT

Under the governing substantive due process principles most recently stated in *Foucha*, confinement under the Kansas Act must be justified as a criminal sanction, as

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[5] The Kansas Supreme Court relied in part on a federal district court decision striking down Washington's sexual predator statute, which is similar to the Kansas Act, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995). The Supreme Court of Washington had earlier upheld the Washington statute. *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993).

preventive detention, or as a *parens patriae* measure to provide care and treatment. But, given Hendricks's prior criminal punishment for his only acts, which pre-date the Kansas Act, his confinement could not be deemed criminal without violating the double jeopardy and *ex post facto* clauses of the Constitution. Nevertheless, the criminal character of the Kansas Act is strong, and neither the highly limited categories of permitted preventive detention nor the traditional standards for *parens patriae* commitment of the mentally ill encompass the Kansas Act. Far from providing an optional alternative to criminal remedies, the Act improperly creates an essentially indefinite involuntary extension of criminal incarceration.

The structure of the Kansas Act, including its predication on a criminal act and its exclusive remedy of secure confinement, give it a strong criminal cast. So, too, does the fact that Kansas has not disavowed any interest in criminal punishment of the conduct targeted by this Act. The State's plain interest is in simple involuntary incapacitation of certain convicted criminals. But that interest is a traditional criminal aim, one that could in fact be served still more effectively if Kansas wished. It cannot be deemed non-criminal, when standing alone, without fundamentally undermining the tradition of tight limits on preventive detention in our Nation and allowing an end-run around the constitutional bars on multiple and retroactive punishment. This Court's decision in *Allen v. Illinois*, 478 U.S. 364 (1986), did not authorize such a breach of basic principle, because the petitioner was unquestionably in need of treatment for a psychosis and the State had disclaimed its punitive interest and otherwise put forward a facially well-grounded *parens patriae* interest.

The Kansas Act cannot be upheld as a form of preventive detention under the decisions authorizing limited pretrial confinement as an adjunct to imminent criminal processes or involving special governmental powers in times of war or other extraordinary contexts. Nor, given the uncertainties of relevant mental-health predictions of violence, can the Kansas Act be analogized to a quarantine for a known contagious disease. Validity of the

Kansas Act would instead require a general state power to confine people indefinitely based on predictions that they would "likely" cause serious harm. Such a power has never been approved by this Court and would threaten our most basic traditions of liberty.

The Kansas Act, implicitly recognizing those traditions, tries to wrap itself in the special tradition of civil commitment of the mentally ill, but the State has missed the essential point behind that tradition. "Mental illness" can mean different things for different purposes, but for purposes of involuntary confinement under this traditionally distinctive authority, the critical condition is an impairment that supports a well-grounded *parens patriae* interest in the individual's care and treatment. Whatever the precise limits on such an interest—whether the individual's incompetence is a prerequisite, or whether even a competent individual may be subject to a *parens patriae* state intervention when truly for his or her good—the requisite *parens patriae* interest is lacking here.

Hendricks evidently suffers from no incompetence to care for himself or to make rational decisions; and his risk of committing another sex offense is precisely that, a risk. Given the distinctly limited knowledge of available appropriate treatments and their effectiveness, the essentially indefinite confinement of persons like Hendricks cannot fairly be deemed in *their* interest. The Kansas Act therefore cannot rest on the *parens patriae* interest it invokes, but should candidly be assessed as a public-safety measure—one that would vastly expand the categories of permitted preventive detention even when criminal remedies are available to address the targeted problem.

ARGUMENT

THE CONFINEMENT OF HENDRICKS UNDER THE KANSAS STATUTE WAS UNCONSTITUTIONAL BECAUSE IT LACKED AN ADEQUATE NON-CRIMINAL BASIS

"In our society liberty is the norm . . . ." *United States v. Salerno*, 481 U.S. 739, 755 (1987); *see Foucha*, 504 U.S. at 83. And "[f]reedom from bodily restraint has

always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha*, 504 U.S. at 80. Thus, commitment under the Kansas statute involves a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Vitek v. Jones*, 445 U.S. 480, 491 (1980). As Justice Kennedy summarized the interests at stake in his dissent in *Foucha*, "incarceration of persons is . . . one of the most feared instruments of state oppression and . . . freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments." 504 U.S. at 90.

Given these stakes, the Court in *Foucha* made clear that the permissible grounds for stripping someone of the core freedom to move about are distinctly limited. *Id.* at 80.[6] Confinement is permissible as a sanction for violating a valid criminal law proscribing conduct. *Id.* Confinement has also been narrowly permitted, as a form of preventive detention, to protect against a danger presented by the individual—but only in very limited circumstances. *Id.* at 81-83. And confinement is permissible to care for the mentally ill. *Id.* at 80.

Unlike Louisiana in *Foucha*, Kansas here cannot even begin to defend its regime by characterizing it as a proper *criminal* sanction for those like Hendricks. *Compare Foucha*, 504 U.S. at 90-102 (Kennedy, J., dissenting)

[6] State actions that are aimed specifically and directly at depriving an individual of what is virtually the definition of "liberty"—freedom from bodily restraint—would seem more immediately intrusive than virtually any rule that "merely" proscribes particular *conduct* (*e.g.*, use of birth control) but otherwise leaves an individual free to engage in other activities. Given that even such restrictions on conduct are sometimes subject to strict scrutiny, it is hard to see why a lesser standard should govern constitutional analysis of state action directed specifically at indefinitely locking up an individual in a "secure" facility, where he is separated from family and friends, stripped of normal employment and other life opportunities, and subjected to the restrictive rules of institutions. Traditional civil commitment—based on *parens patriae* interests and typically short term—readily satisfies strict scrutiny (if that standard applies), because it serves compelling interests through narrowly drawn means.

(confinement under Louisiana statute, based on criminal act not already punished, may be valid as *criminal* measure); *cf. id.* at 123-24 & n.17 (Thomas, J., dissenting). Hendricks has already been criminally punished, under pre-existing statutes, for the only conduct that triggers the new confinement regime: certain sex offenses. The addition of further criminal confinement for that conduct, based on a statute enacted after the conduct, would violate both the double jeopardy and *ex post facto* clauses of the Constitution.[7]

For the Kansas statute to pass muster, then, it must fit into either of the two permissible justifications for non-criminal confinement. The Kansas Act, however, in providing for indefinite confinement unrelated to criminal proceedings on a showing of "likelihood" of future offenses, does not come within the narrow categories of preventive detention approved by this Court. Likewise, Hendricks's confinement under the Kansas Act cannot be justified, under present knowledge, as an exercise of Kansas's *parens patriae* power to care for the mentally ill.

[7] The only difference between the original offense and the new "sexually violent predator" standard is a status (a potential for future acts), not any act. *See* State Br. in Kansas Supreme Court at 24 (only element additional to prior sexual act is a "current mental status"). The Constitution does not permit criminal punishment of status. *See Foucha*, 504 U.S. at 80; *Powell v. Texas*, 392 U.S. 514, 532-33 (1968) (plurality); *id.* at 542-43 (Harlan, J., concurring) ("Punishment for a status is particularly obnoxious . . . because it involves punishment for a mere propensity, a desire to commit an offense . . . . This is a situation universally sought to be avoided in our criminal law . . . ."); *Robinson v. California*, 370 U.S. 660 (1962). Thus, even aside from any "lesser included offense" analysis, the Kansas Act punishes the same offense as the previously punished offense and does so, in this case, for an offense that pre-dates the new Act. That result is impermissible under double jeopardy principles. *See Schiro v. Farley*, 114 S. Ct. 783, 789 (1994); *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1941 n.1 (1994); *id.* at 1952-53 (O'Connor, J., dissenting). It is also impermissible under *ex post facto* principles. *See California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 1601 (1995); *Collins v. Youngblood*, 497 U.S. 37, 40 (1990); *Miller v. Florida*, 482 U.S. 423, 430 (1987).

Under substantive due process principles, therefore, Hendricks's involuntary civil confinement is invalid.[8]

The same conclusion of invalidity can be reached by another, though ultimately similar, route. Confinement under the Kansas Act violates Hendricks's double-jeopardy and *ex post facto* rights if it is criminal in character. *See* note 7, *supra*. This Court has repeatedly insisted on looking beyond labels in determining the criminal or civil character of a state imposition. Here, the insufficient grounding of the Act in *parens patriae* interests or in the narrow bases of permitted preventive detention render the Act ultimately criminal under familiar standards.[9]

[8] Statutes that provide for voluntary alternatives to valid criminal sanctions, as well as those which apply to persons who successfully (and voluntarily) raise an insanity defense, would require a different constitutional analysis, taking into account the general validity of openly criminal sanctions in such cases.

[9] In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the Court defined the analysis as follows: "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it apears excessive in relation to the alternative purpose assigned . . . ." (footnotes omitted). *See Schall v. Martin*, 467 U.S. 253, 264, 269 (1984); *Bell v. Wolfish*, 441 U.S. 520, 534 (1979). The Kansas Act involves a severe affirmative restraint (confinement) that historically has been regarded as punitive, except under the special conditions identified in *Foucha* (*parens patriae* and narrow preventive detention), and that serves the criminal purpose of specific deterrence (*i.e.*, incapacitation); and the predicate sex offenses are by definition crimes, typically requiring scienter. That the Kansas scheme appears criminal in all of those ways should trigger a heavy burden of establishing a weighty non-criminal alternative basis.

In contexts not involving confinement, such as forfeiture of property or imposition of penalties, the Court has, in similar fashion, asked whether the legislature intended the sanction to be civil and, if so, "whether the statutory scheme was so punitive either in purpose or effect as to negate [the legislature's] intention to establish a civil remedial mechanism." *United States v. Ursery*,

A. The State's Confinement Scheme Has a Strongly Criminal Character

1. The basic features of the Kansas Act, and related Kansas law, lend the Act a strongly criminal cast. A crime is the essential precondition for application of the Act. Only the prosecutor, representing the State, can bring the action, which then has all the outward appearance of a criminal trial. The proceeding is aimed at placing the defendant in "secure" confinement, which may actually be under the control of the state prison authorities. No discretion is vested in non-correctional authorities to make individualized judgments about less restrictive alternatives to suit the individual's medical needs. And, at least at the time of Hendricks's initial confinement, the Kansas Supreme Court concluded, no significant treatment was taking place in the secure facility. Pet. App. 16a.

Normal civil commitment of the mentally ill, in contrast, is not predicated on a criminal act (even when "danger" must be proved). Civil commitment proceedings, moreover, are not under prosecutors' control, but commonly are initiated by mental-health professionals or family members, *i.e.*, those with an expected genuine interest in the individual's welfare. *See* S. Brakel *et al.*, *The Mentally Disabled and the Law* 31-33 (3d ed. 1985). And civil commitment places individuals in the care of mental-health professionals (rather than correctional authorities), typically leaving substantial treatment discretion in their hands to decide on appropriate less restrictive alternatives for particular individuals.

Kansas also has not in any meaningful way disclaimed an interest in criminal punishment of persons like Hendricks. The Kansas Act does not route individuals into its proceedings as an *alternative* to criminal measures:

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116 S. Ct. 2135, 2142 (1996) (internal quotation marks omitted); *see Kurth Ranch*, 114 S. Ct. at 1953 (O'Connor, J., dissenting); *United States v. Halper*, 490 U.S. 435 (1989); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984); *United States v. Ward*, 448 U.S. 242, 249 (1980). This formulation also focuses on non-criminal purposes, which might be less difficult to establish for state measures short of bodily confinement.

criminal charges are not dropped for those subjected to the present regime; instead, confinement occurs *after* service of the criminal sentence for the predicate sex offense (except in cases of insanity acquittals or incompetence to stand trial, not involved here). Moreover, Kansas continues to impose criminal sanctions on the very conduct that the new Act targets: following the *M'Naghten* test for insanity, Kansas holds individuals criminally responsible for their criminal acts without regard to the sort of volitional ("irresistible impulse") impairments invoked by the present Act. *See* Pet. App. 45a (insanity defense available only if defendant "does not know the nature and quality of his act or where he does not know right from wrong with respect to that act"). Under Kansas law, therefore, there is no question that persons like Hendricks *are* criminally responsible for their acts, because they have a rational appreciation of the choices they face and the rightness or wrongness of those choices. *See* J.A. 141, 156-58, 160, 166, 172, 176, 184, 185 (Hendricks testimony); *see also* Kan. Stat. Ann. § 21-4716 ("predatory sex offender" receives *enhanced* criminal sentence).[10]

2. The intent behind the Kansas Act, far from a *parens patriae* purpose focused on serving the interests of those subject to it, unmistakably focuses on incapacitation of such criminals to neutralize their potential for doing harm to others. The label "predator" connotes a purposeful actor to whom the State's attitude is hostility and a desire to restrain for others' sake, hardly empathic concern. The Attorney General of Kansas, testifying in support of the Act, never mentioned any interest in treatment, but instead touted the law as providing for continued "incarceration":

> Most new laws against criminal conduct tend to provide punishment after the victimization has occurred.

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[10] The State of Washington follows the same test for insanity, requiring cognitive rather than volitional incapacity; that is, Washington requires that the defendant be unable "to perceive the nature and quality of the act with which he is charged" or "to tell right from wrong with reference to the particular act charged." Wash. Rev. Code Ann. § 9A.12.010.

> Senate Bill 525 will act prospectively and be preventative of criminal conduct and not just punitive. You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence. As I am convinced none of them should ever be released, I believe you, as legislators, have an obligation to enact laws that will protect our citizens through incapacitation of dangerous offenders.

J.A. 468-69. This is the language not of *parens patriae* concern, but of intent to continue criminal imprisonment.

Incapacitation (or specific deterrence) of the defendant is, along with retribution and general deterrence, a well-established purpose of criminal law. *See* 4 W. Blackstone, *Commentaries* *11-12 (punishment serves "as a precaution against future offences" by, for example, "the amendment of the offender himself" or "depriving the party injuring of the power to do future mischief"); *id.* at *249; *Montana v. Egelhoff*, 116 S. Ct. 2013, 2020 (1996) (plurality) (*criminal*-law rule "also serves as a specific deterrent, ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison"); *Foucha*, 504 U.S. at 99 (Kennedy, J., dissenting); 18 U.S.C. § 3553(a)(2)(C). Indeed, in *Specht v. Patterson*, 386 U.S. 605 (1967), this Court concluded that a state sex-offender statute inflicted "criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm." *Id.* at 608-09 (footnote omitted); *see United States v. Brown*, 381 U.S. 437, 458 (1965) ("One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.").

A state measure predicated on criminal conduct and resting exclusively on an interest in indefinite preventive incapacitation of the offender must generally be on the "criminal" side of the constitutional ledger. Otherwise, as *Foucha* warned, little would be left to the general rule that criminal acts by competent adults are left to the criminal process (with its double-jeopardy, *ex post facto*, and other restrictions) under the Constitution. 504 U.S. at 82-83. If preventive incapacitation based on criminal conduct, standing alone, counted as a civil purpose, then any person for whom a criminal act and dangerousness could be proved—as was assumed, for example, in the substantive due process portion of *Foucha*—could be locked up until no longer dangerous. Such a result is hardly consistent with the tight limits on civil preventive detention, and constraints on multiple and retroactive punishment, recognized by this Court.

3. If the Kansas Act serves traditionally criminal purposes and targets acts that Kansas would criminally punish, it is also clear, as the Kansas Supreme Court observed, that additional, openly criminal measures are available to pursue still further the public-safety purposes served by the Act. A State may seek to sentence an offender to the full authorized sentence rather than plea bargain for shorter confinement, may seek consecutive rather than concurrent sentences, or may invoke recidivism statutes to lengthen imprisonment; it may enact longer sentences or further recidivism statutes if necessary and may use criminal proscriptions on attempts and threats to attack incipient misconduct; and it may use parole or probation to place severely enforced restrictive conditions on post-release behavior. *See* Pet. App. 16a. In the present case, indeed, Kansas apparently has powers of supervision over Hendricks, who was released after 10 years of a 5-20 year sentence under a form of parole. *See* Kan. Stat. Ann. § 22-3718.[11] What the Court said in *Foucha* about inmate violence is equally applicable here (504 U.S. at 82):

> [T]he State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways

[11] Even outside the criminal context, means well short of confinement—*e.g.*, court orders to avoid schools or children, community-notice provisions—may be available as well.

of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct.

4. In *Allen v. Illinois*, which involved a statute (Illinois' Sexually Dangerous Persons Act) that had some of the characteristics that give a criminal cast to the Kansas scheme, this Court rejected the defendant's claim that the proceeding was criminal (for purposes of the self-incrimination clause). 478 U.S. 364. The confinement of Hendricks under the Kansas Act, however, is significantly different. The key factors that supported the non-criminal assessment in *Allen* are missing here.

First, *Allen*, unlike the present case, involved an individual who was severely mentally ill in the classic sense relevant to traditional civil commitment, *i.e.*, he had schizophrenia, a fact stressed by the State.[12] As a result, the State's asserted interest in offering truly needed treatment was entirely plausible on the facts of *Allen*, and there was no other record showing that, more generally, the State's asserted interest in treatment was hollow. Second, unlike Kansas, the State in *Allen* had "disavowed any interest in punishment" (478 U.S. at 370)—and simultaneously reinforced its non-criminal, *parens patriae* interests—by the very structure of the statute. Unlike Kansas here, the State in *Allen* was required to "elect between a criminal prosecution and a sexually dangerous persons proceeding," dropping any criminal charges once the election of the latter option had been made, thus providing for "treatment in lieu of prosecution." Brief for Respondent Illinois in *Allen* at 12; *see Allen*, 478 U.S. at 369 n.5. And the Illinois statute, unlike the Kansas Act, provided for conditional release under the supervision of the State's mental-health authorities. *Id.* at 369 n.4. In *Allen*, then, this Court concluded that, not only were criminal interests disavowed by the State, but the State's public-safety concerns were no more than a "supplement [to] its *parens patriae* concerns." 478 U.S. at 373. In this case, the Kansas Supreme Court properly rejected such a view of the Kansas Act. Pet. App. 16a.

[12] *See Allen*, 478 U.S. at 366 (State's psychiatrists testified that Allen was "mentally ill"); Brief for Respondent Illinois in *Allen* at 3 & 11 n.3 (Allen "was diagnosed as psychotic, or 'out of touch with reality', and suffering from a schizophrenia characterized by aggressive and abnormal behavior"; "diagnosed as being schizophrenic"); *id.* at 13 n.4 (insisting that Illinois statute was different from "[s]tatutes which do not require proof of mental illness").

B. The State's Confinement Regime Does Not Fall Into One of the Narrow Categories of Permitted Preventive Detention –

In *Foucha*, this Court confirmed that a detention regime designed entirely to prevent potential harm to others has been upheld only in narrow circumstances. 504 U.S. at 80-82. Thus, preventive detention has been upheld when brief in duration *and* tied closely to an impending criminal proceeding. *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987); *Schall v. Martin*, 467 U.S. 253 (1984) (additional factor: power over juveniles); *cf. County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (detention of crime suspect before arraignment). The Kansas Act in no sense provides such a short-term, pretrial adjunct to the criminal process: it provides for indefinite confinement where no criminal proceeding is permissible. The Kansas Act thus serves as an evasion of the limits on the criminal process, not as an adjunct to that process.

Preventive confinement has also occurred with this Court's approval, or at least without its disapproval, in certain extraordinary contexts—in times of war or insurrection (*Ludecke v. Watkins*, 335 U.S. 160 (1948); *Moyer v. Peabody*, 212 U.S. 78 (1909)) and with respect to aliens in the immigration context (*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952)). But special, self-limiting government powers exist in those contexts. No such power can be called on to justify the Kansas Act, which would require a general state power to confine individuals for preventive purposes—a power that would transform our tradition of liberty.

A general police power *would* seem to be available to confine individuals where unavoidably necessary to prevent an imminent, known hazard, such as the spread of highly contagious diseases. *Cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination). But the most presumptively valid exercises of such power involve situations where the threat is compellingly clear, the harm is effected through means other than voluntary human action, and the detention is the least restrictive means to address the urgent problem. The Kansas Act cannot come within such a standard without so loosening the standard as to leave few limits on preventive detention.

In addition to the fact that human action is the mechanism of harm in the present context, there is, in the area of psychiatric prediction of violence by the mentally ill, nothing like the level of certainty applicable to a contagious disease. This Court has noted as much. *See Heller v. Doe by Doe*, 113 S. Ct. 2637, 2644 (1993) ("diagnosis of mental illness is difficult" and "psychiatric predictions of future violent behavior by the mentally ill are inaccurate"); *Addington v. Texas*, 441 U.S. 418, 429 (1979) ("Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."). And, as relevant here, the research literature shows that mental health professionals can generally make sound expert predictions of violence only as matters of probabilities, which are "rarely above 50%" and often substantially less. Grisso & Appelbaum, *Is It Unethical to Offer Predictions of Future Violence?*, 16 L. & Human Behavior 621, 626 (1992).[13] With respect to pedophilia

[13] *See, e.g.*, Menzies *et al.*, *The Dimensions of Dangerousness Revisited*, 18 L. & Human Behavior 1, 25 (1994) (despite recent improvements in knowledge, "on the critical question—namely, whether experts or instruments can reliably and validly differentiate between potentially violent and innocuous human subjects—the overwhelming body of empirical evidence remains highly equivocal"); J. Monahan & H. Steadman eds., *Violence and Mental Disorder* (1994). Cases under the Kansas Act do not involve what may be the different situation of predicting immediate violence in psychosis-based emergencies.

particularly, the rates of sex-offense recidivism documented in studies vary widely, seemingly all below 50%.[14]

Kansas, presumably recognizing the problems of prediction, has required no more than that the defendant be "likely" to engage in sexual offenses some time in the future. Kan. Stat. Ann. § 59-29a02. No more was found by the jury (J.A. 359) or asserted by the State's expert (J.A. 248, 254) in this case. Consistent with the common meaning of this standard, the State's expert twice confirmed his understanding that it required only that Hendricks have a 50% probability of committing a future act of sexual violence. J.A. 260-61, 279. *See also* page 28 & note 25, *infra* ("safe" standard for release).

In the normal civil-commitment context, where the essential condition for commitment is a *parens patriae* interest in providing care and treatment (typically short-term) for the good of the patient, there often is a secondary "dangerousness" requirement, which is subject to "clear and convincing" proof. *See Addington, supra*. If no *parens patriae* purpose is present, and prediction is the sole basis for confinement (in a "secure" facility), "likely harm" as a ground for detention is unprecedented, and itself dangerous to the principles of a free society. If "likely harm" were enough, detention might be justified for any number of classes of individuals, such as alcoholics and substance abusers, whose characteristics are significantly associated with violence (and with difficulties of being "cured").[15] Moreover, if courts were required to focus on

[14] The leading survey of the literature, aside from noting the grave methodological limits on existing studies and the likely underreporting of recidivism, summarizes a wide range of sex-offense recidivism rates—from 6% to 40%. *See* Furby, Weinrott, & Blackshaw, *Sex Offender Recidivism: A Review*, 105 Psychological Bull. 3, 12-19 (1989) (studies separately focusing on pedophiles: numbers 5, 6, 14, 22, 27, 30, 33, 38).

[15] "A large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the num-

making accurate predictions, they would risk being faced with overt reliance on various human characteristics that might be asserted to provide statistically significant information about offense rates and yet raise independent legal and other issues. *See, e.g.*, Furby *et al., supra*, at 5, 27; Swanson, *Mental Disorder, supra,* at 120-21. Upholding the Kansas Act *without* a well-grounded *parens patriae* interest thus would dramatically break with our Nation's strong tradition against preventive confinement based on uncertain predictions.

C. The State's Asserted *Parens Patriae* Interest in Treatment Is Not Well Grounded and So Does Not Alter the Character of the Confinement

1. This Court made clear in *Foucha* that civil confinement, when not falling within one of the narrow categories of permissible detention for public safety alone, must be based on "mental ill[ness]." 504 U.S. at 80; *see id.* at 94 (Kennedy, J., dissenting) ("beyond question" that "in civil proceedings the Due Process Clause requires the State to prove both insanity and dangerousness by clear and convincing evidence"). The Kansas Act seeks to cloak itself in this traditional state power. But mere invocation is not enough to come within this distinctive power, whose scope must be defined by the tradition and the fundamental conception of personal autonomy behind it.

Historically, the essential condition for confinement of the mentally ill has been a *parens patriae* justification, even when supplemented by police-power interests in protecting the public. *See Foucha*, 504 U.S. at 96 (Kennedy,

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bers as high as half of all homicides, for example." *Montana v. Egelhoff*, 116 S. Ct. at 2020 (plurality) (citing Third Special Report to the U.S. Congress on Alcohol and Health from the Secretary of Health, Education, and Welfare 64 (1978) and Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1681-1682 (1981)). The research literature demonstrates that substance abusers present very high risks of violence and recidivism. *See* Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in J. Monahan & H. Steadman eds., *Violence and Mental Disorder* at 101-36 (1994).

J., dissenting) ("[i]n the civil context, the State acts in large part on the basis of its *parens patriae* power to protect and provide for an ill individual, while in the criminal context, the State acts to ensure the public safety").[16] "Mental illness" as a ground for involuntary confinement may require, as a prerequisite, that the individual lack rational capacity to make his own treatment decisions; more broadly, it may justify a confinement even of a competent individual when otherwise truly for his own good. But whichever standard governs—and the Court need not decide here, because neither standard is met, as explained below—confinement based on "mental illness" must rest on the State's *parens patriae* power to override the individual's autonomy to act for his own good.

When a State invokes this power, the reality of the confinement must support the claim that it is in the individual's interest. If "mental illness" were freely subject to legislative definition (through new terms like "mental abnormality" or otherwise), or if anyone "crazy" or "sick" enough to engage in repeated serious offenses could be civilly confined for that reason, the limits on deprivations of liberty to protect the public safety would quickly disappear. When an assertion of a *parens patriae* interest is not well grounded, the State either is acting to punish the individual, and thus has to meet the requirements for a valid criminal sanction, or is acting to serve *others'* interests by preventive detention, and thus has to meet the stringent standards for such action—neither of which Kansas can do.[17]

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[16] *See also Allen*, 478 U.S. at 373 (public-safety concern "supplements" the State's *parens patriae* concerns in commitment for treatment); *Addington*, 441 U.S. at 426 (noting that *parens patriae* basis is present in normal civil commitment, along with police power); *Mentally Disabled and the Law* 24-25; 1 M. Perlin, *Mental Disability Law* §§ 2.02-2.05 (1989).

[17] This is not a case where history resolves the constitutional issues, because sex psychopath laws like the Kansas Act do not reflect a long-established societal judgment that effectively permanent civil preventive confinement of already-punished offenders, based only on "likely" harm, is reasonable. Many States enacted

2. Just as state legislative dictates cannot control the standard of "mental illness" justifying involuntary confinement, so, too, the standard cannot be controlled by the categories set forth in the APA's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (*DSM-IV*) (or in the various editions of the related *International Classification of Diseases*). Such catalogues include a vast range of disorders that vary widely in severity and type of impairment (*e.g.*, cognitive, mood, sexual, eating, learning, sleep, adjustment, etc.). The classification schemes are developed and periodically altered, through comprehensive field trials, research, and analysis, to serve diagnostic and statistical functions, forming a common (and always imperfect) language for gathering clinical data and for communication among mental health professionals. *DSM-IV* at xv-xxv. These schemes are designed to identify the full range of mental disorders, each (according to the inevitably imprecise definition)

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sex psychopath laws during the middle decades of this Century, but they evidently were not put to wide-spread use (except in California); sometimes enacted at times of public panic and then quickly forgotten, they were generally justified by the asserted, and often well-motivated, *parens patriae* interest in providing effective and caring treatment as an alternative to criminal punishment; yet by the 1970s such laws had been widely repealed as a failed experiment, with the recognition that effective and truly needed treatment was not meaningfully available. *See* Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. Crim. L., Criminology, & Police Sci. 215, 225 (1960); *Mentally Disabled and the Law* 739-43; *see generally* Group for the Advancement of Psychiatry, *Psychiatry and Sex Psychopath Legislation: The 30s to the 80s* (1977); ABA, *Criminal Justice Mental Health Standards* 455-61 (1984) (Standard 7-8.1, urging repeal of remaining sex psychopath laws; discussing history). This experience is not enough to justify what amounts to a regime of preventive detention, particularly for convicted offenders, in the absence of available, effective, needed treatment. This Court's decision in *Minnesota v. Probate Court*, 309 U.S. 270 (1940), which rejected vagueness, equal-protection, and procedural-due-process challenges to a sex psychopath law (whose application "was not triggered by a criminal conviction," *Specht*, 386 U.S. at 610 n.3), is not to the contrary.

> a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.[18]

Such comprehensive classification schemes are not restricted to identifying those persons who warrant involuntary treatment, let alone confinement. Nor are they designed to identify those subject to various legal standards, such as those for involuntary confinement. Thus, the authors of *DSM-IV* caution that "[i]n most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder,' 'mental disability,' 'mental disease,' or 'mental defect.'" *DSM-IV* at xxiii. The authors further caution that "a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder." *Id.* Not all individuals who come within a *DSM-IV* category suffer an impairment that diminishes their autonomy, much less one justifying involuntary confinement for the individual's own good.

Indeed, this Court held in *Foucha* that "antisocial personality disorder"—one of the "personality disorders" catalogued in *DSM-IV*, characterized by "a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years" (*id.* at 649)—is not the sort of "mental illness" that permits a *parens patriae* civil commitment.

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment,

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[18] *DSM-IV* at xxi. The definition adds that "[n]either deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfuncton in the individual." *Id.* at xxii.

> he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

Foucha, 504 U.S. at 82-83. The same circularity problem would be present if the Constitution allowed confinement based on a "mental abnormality" whose defining characteristic was a pattern of "abnormal" acts. *See* Pet. App. 19a (State's witness noted circularity of statutory definition of "mental abnormality").[19] Such a standard for "disorder" would substantially destroy any limits on state power to provide for preventive civil detention, because it would not "enable a court to differentiate those who suffer such disorders from those who simply want to engage in proscribed conduct." Schopp & Sturgis, *supra*, at 451.

3. Kansas has effectively set the limits on its own *parens patriae* interest, through its civil commitment laws: Kansas does *not* displace autonomous decisionmaking by subjecting individuals to involuntary confinement under such laws unless they lack reasonable capacity to make

[19] *See* Schopp & Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 Behav. Sci. & L. 437, 451 (1995) (allowing confinement based on "any emotional state that motivated deviant conduct, including strong desires to engage in such behavior, . . . would . . . include virtually anyone who engages in seriously antisocial conduct"). The American Law Institute, in adopting its insanity-defense standard as part of the Model Penal Code, was careful to note that the required " 'mental disease or defect' do[es] not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." *Model Penal Code* § 4.01(2) (1962).

their own treatment decisions. *See* Kan. Stat. Ann. § 59-2902(e), (h); note 2, *supra*. This "competence" standard for *parens patriae* confinement is also embodied in the APA's *Guidelines for Legislation on the Psychiatric Hospitalization of Adults*, 140 Amer. J. Psychiatry 672 (1983), which require lack of "capacity to make an informed decision concerning treatment," *i.e.*, inability "to engage in a rational decision-making process regarding such hospitalization or treatment, as evidenced by inability to weigh the possible risks and benefits." *Id.* at 673.[20] This view is reflected as well in the historical definition of "lunatics" (subject to involuntary commitment) as persons lacking "reason," that is, "incapable of conducting their own affairs." 1 W. Blackstone, *Commentaries* *294.[21]

This standard finds its counterpart in Kansas's standard for relieving individuals of *criminal* responsibility under the insanity defense—cognitive impairment, not volitional impairment. *See* page 13, *supra*.[22] The connection

[20] *See* Stone & Stromberg, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 Harv. J. Legis. 59, 64 (1983) ("The Model Law [which led to the APA Guidelines] seeks to put the *patients'* interests first. It therefore rejects the idea that dangerousness is the only valid basis for commitment, and instead makes the provision of treatment the indispensable element justifying commitment. Under the Model Law, *parens patriae commitment* requires that the patient suffers from a severe mental disorder, lacks 'capacity to make a reasoned decision concerning treatment,' is treatable, and is likely to harm himself or others.").

[21] This notion embodies what seems the most familiar commonsense meaning of the phrase "mentally ill." *See* M. Moore, *Law and Psychiatry* 197 (1984): "[T]he mental abilities of perception, memory, imagination, and particularly reasoning are necessary in the acquisition of rational beliefs and in maintaining consistency between belief sets and desire sets. Rationality is one of the fundamental properties by which we understand ourselves as persons, that is, as creatures capable of adjusting our actions as reasonably efficient means to rational ends. Being mentally ill means being incapacitated from acting rationally in this fundamental sense."

[22] This is the traditional common-law standard (*see, e.g.*, 4 W. Blackstone, *Commentaries* *21, *24; *Mentally Disabled and the Law* 709) and, more recently, has been re-established as the insanity-defense standard under federal law (18 U.S.C. § 17) based on the

between the criminal standard and the standard for permissible involuntary civil confinement under a *parens patriae* power is natural, if not inevitable: lack of substantial responsibility for one's own actions has traditionally been the central justification both for excusing criminal liability and for allowing state intervention for the *parens patriae* purpose of taking care of "persons incapable of looking after their own interests." *Zinermon v. Burch*, 494 U.S. 113, 133 (1990). Not surprisingly, an equation of the "mental illness" standard for civil commitment and the criminal-law concept of "insanity" not only has historical roots (*see* 4 W. Blackstone, *Commentaries* *24 (using same term "lunatics" and equating concepts)) but also has sometimes been assumed in this Court. *E.g.*, *Heller*, 113 S. Ct. at 2646; *Foucha*, 504 U.S. at 94 (Kennedy, J., dissenting).

Under this test of the relevant *parens patriae* meaning of "mental illness" for confinement purposes, confinement of Hendricks under the Kansas Act cannot be justified. The statutory "mental abnormality" or "personality disorder" creating a propensity for sex offenses does not demand any impairment of competence—any "[i]mpairment undermining the capacity to direct one's behavior through the process of practical reasoning." Schopp & Sturgis, *supra*, at 450, 455. More particularly, Hendricks's

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widespread recognition that "[t]he line between an irresistible impulse and an impulse not resisted" is indeterminate in practice and profoundly problematic in theory. *APA Statement on the Insanity Defense*, 140 Amer. J. Psychiatry 681, 685 (1983); *see* S. Rep. 98-225, 98th Cong., 1st Sess. 225-29 (1983) (testimony from Professor Bonnie stating: " 'there is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity. There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistable and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment.' "); *see also Powell v. Texas*, 392 U.S. at 525-26 (plurality); Schopp & Sturgis, *supra*, at 446-47; Morse, *Culpability and Control*, 142 U. Penn. L. Rev. 1587, 1601 (1994); *Mentally Disabled and the Law* 709-19.

pedophilia, like other "paraphilias," presents no such impairment of cognitive abilities. *See DSM-IV* at 522-23. "Neither sexual assault nor the paraphilias, including pedophilia, entail psychological aberration apart from the desire to perform such conduct and the willingness to act on that desire." Schopp & Sturgis, *supra*, at 451 (footnote omitted). Confinement of individuals like Hendricks, then, cannot rest on a *parens patriae* assertion of incompetence such as would justify substituted judgment in the absence of informed consent to treatment.

4. Nor can Hendricks's confinement be justified under a broader *parens patriae* state power simply to act in what is clearly the patient's best interest (notwithstanding a competent refusal of treatment). The ease with which hollow state invocations of treatment interests may mask a real interest in mere incapacitation makes it important to demand a substantial basis in fact for any state claim that an individual's confinement is for the purpose of treatment for his benefit.[23] And in this case, the Kansas Supreme Court concluded that, whatever the State's aspirations, Kansas had essentially no treatment actually available to Hendricks when he was confined.[24] *See Jack-*

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[23] *See* Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal," in *Crime, Law, and Society* 271, 276-78 (A. Goldstein & J. Goldstein eds. 1971) ("Certain measures, like the sexual psychopath laws, have been advanced and supported as therapeutic in nature when, in fact, such a characterization seems highly dubious. Too often the vocabulary of therapy has been exploited to serve a public-relations function. . . . [T]here is a strong tendency for the rehabilitative ideal to serve purposes that are essentially incapacitative rather than therapeutic in character.").

[24] Pet. App. 15a ("Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. . . . [T]he provisions of the Act for treatment appear somewhat disingenuous."); *cf.* J.A. 392-455 (later hearing on the treatment available at the Kansas institution).

If Hendricks's initial confinement was illegal, and if he had been released at that time, the Kansas Act would not have furnished any evident mechanism for bringing him back into custody to face "sexually violent predator" charges. *See* Kan. Stat. Ann. § 59-29a03

son v. Indiana, 406 U.S. 715, 728 (1972) ("it is problematical whether commitment for 'treatment' or 'training' would be appropriate since the record establishes that none is available for Jackson's condition at any state institution"). More generally, the Kansas Act is not tailored to a real *parens patriae* treatment interest.

A *parens patriae* interest would require an individualized, flexible approach to the provision of treatment, with a range of options available, including hospitalization and outpatient treatment, to serve the individual's needs best. Yet the Kansas statute provides instead for a stark rule of confinement in a secure facility and requires continued confinement until a judge or jury, based on professional testimony, concludes that the risk of recidivism has been so reliably and substantially reduced that the individual is "safe to be at large." Kan. Stat. Ann. §§ 59-29a07, 59-29a08, 59-29a10, 59-29a11.[25] The State seeks a " 'guarantee.' " Kansas Opening Br. 11. Where such a guarantee is impossible, the result is an essentially life-time confinement of a person who, if given the opportunity, presents a substantial chance of living in freedom without relapse (like alcoholics or substance abusers). *See* J.A. 478 (Act "would allow us to keep the sexually violent offenders locked up indefinitely").

In fact, it is just such life-time confinement that Kansas must justify, because the standard of effective treatment demanded by the Kansas Act cannot be met today. Current treatments for pedophilia include various types of psychotherapy, cognitive-behavioral therapies, and pharmacological treatments; and such treatments, in varying degrees and for particular individuals, provide benefits

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(statute providing for initiation of proceedings only as to certain persons prior to release from state custody).

[25] If the evidence in this case was legally sufficient to support initial and continued confinement under the Kansas Act, then the Act's legal requirements, coupled with the natural tendency to be risk-averse in cases like this, effectively set a standard of near-zero tolerance of relapse. *See* J.A. 356, 483, 509, 567.

that make them important to pursue.[26] But they cannot today do what Kansas demands: even when promising, the available treatments are far from proven, for known classes of patients, to be not only safe but also so effective at reducing risk as to lead to release under the Kansas Act. As the GAO recently summarized the current state of learning, "[t]he most optimistic reviews [of research] concluded that some treatment programs showed promise for reducing deviant sexual behavior," but "little is certain about whether, and to what extent, treatments work with certain types of offenders, in certain settings, or under certain conditions." *GAO Report* at 11, 3. *See also* Furby, *et al., supra*, at 27 ("There is as yet no evidence that clinical treatment reduces rates of sex reoffenses in general and no appropriate data for assessing whether it may be differentially effective for different types of offenders."); J.A. 328-29.[27]

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[26] These treatment methods are summarized in the recent General Accounting Office report, *Sex Offender Treatment: Research Results Inconclusive About What Works to Reduce Recidivism* at 20-21 (June 1996) ("*GAO Report*"). *See also* G. Abel & C. Osborn, *Pedophilia*, in 2 G. Gabbard ed., *Treatments of Psychiatric Disorders* ch. 70 (2d ed. 1995); Bradford, *Pharmacological Treatment of the Paraphilias*, in *Review of Psychiatry* vol. 14, at ch. 29 (1995); H. Kaplan & B. Sadock, eds., *Comprehensive Textbook of Psychiatry* 1346-47 (6th ed. 1995).

Psychotherapy in this context seeks to alter behavior through self-understanding. Cognitive-behavioral treatments include, among other techniques, different kinds of therapies designed to create, through psychological or physical means, aversion toward the pedophilic impulses. Pharmacological treatments being studied, some of which are sometimes referred to as "chemical castration," include several medications that dampen the sex drive by reducing testosterone—cyproterone acetate, or CPA (which is not approved for general use in the United States); medroxyprogesterone, or MPA; and leuprolid acetate, or LPA. Another new pharmacological approach, whose mechanism is not understood, seeks to inhibit "serotonin reuptake," through medications that are principally used for obsessive-compulsive disorders and depressions. Surgical castration and psychosurgery, however effective, are highly invasive and would not be ethically condoned in an involuntary procedure.

[27] *See GAO Report* at 3 ("Psychotherapy was generally viewed as not being effective except, in certain cases, when administered in

In sum, the Kansas Act's effort to justify confinement by invoking a *parens patriae* interest in treatment "goes much too far on the basis of too little knowledge." *Powell v. Texas*, 392 U.S. at 521 (plurality). With today's knowledge, confinement under the Kansas Act is effectively permanent. As applied to a person like Hendricks, who is not mentally incompetent and who may well live free of relapse, such confinement cannot rest on an assertion that it is in *his* best interest—that it serves *his* "treatment needs" (Kan. Stat. Ann. § 59-29a01). The Kansas Act should be candidly defended as a simple public-safety measure and assessed accordingly under the demanding constitutional standards applicable to preventive detention.

CONCLUSION

The judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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Dated: August 16, 1996

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combination with another treatment approach."); *id.* at 7 ("there was no consensus even among [the reviewers discussing pharmacological treatments] about a particular drug being most effective, nor about the duration of positive effects from such interventions"); *id.* (1990 report by the Canadian Solicitor General on overall treatment programs: "'A reasonable conclusion . . . is that treatment can be effective in reducing recidivism from about 25% to 10-15%.'"); W. Marshall, D. Laws, & H. Barbaree eds., *Handbook of Sexual Assault* (1992).